# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

**HALLMARK-PHOENIX 3, LLC** 

and

Case No. 12-CA-090718

TRANSPORT WORKERS UNION OF AMERICA, LOCAL 525, AFL-CIO

**HALLMARK-PHOENIX 3, LLC** 

and

Case No. 12-CA-094037

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 780, AFL-CIO

John King, Esq., Counsel for the General Counsel.

Bryant Banes, Esq., Neel, Hooper & Banes, P.C., Counsel for the Respondent.

Paul Berkowitz, Esq., Paul Berkowitz & Associates, Ltd., Counsel for Charging Party IATSE.

Kevin Smith, President, TWU Local 525.

#### **DECISION**

#### **Statement of the Case**

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on March 3. 2014 in Cocoa, Florida. On January 30, 2013, Complaint issued in Case No. 12-CA-90718 based upon an unfair labor practice charge and an amended charge filed on October 4, 2012<sup>1</sup> and January 11, 2013 by Transport Workers Union of America, Local 525, AFL-CIO, herein called TWU. On February 28, 2013, Complaint issued in Case No. 12-CA-94037 based upon an unfair labor practice charge and an amended charge filed on November 30 and February 27, 2013 by International Alliance of Theatrical Stage Employees and Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 780, AFL-CIO. herein called IATSE. These Complaints allege that TWU represents an appropriate unit of employees at Cape Canaveral Air Force Station and that since in about October 2010, Hallmark-Phoenix 3, LLC, herein called the Respondent, has recognized it as the exclusive collective bargaining representative of these employees and that this recognition was embodied in a collective bargaining agreement effective from October 1, 2010 to September 30, 2014, and that IATSE represents an appropriate unit of employees at Patrick Air Force Station and that since about October 1, 2008 the Respondent has recognized it as the exclusive collective bargaining representative of these employees, and this recognition was embodied in a collective bargaining agreement effective from September 1, 2011 to August 31, 2014 . The Complaints allege that the Respondent failed and refused to continue in effect all the terms and conditions of these collective bargaining agreements since about August 31, by (in the TWU Complaint):

<sup>&</sup>lt;sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2012.

- (a) Failing and refusing to pay the unit employees for their accrued vacation time as required by the contract; and
- (b) Failing and refusing to pay employees Severance Pay as required by the contract.

It is alleged that these are mandatory subjects of bargaining, and that by failing and refusing to pay these employees their accrued vacation pay and severance pay, the Respondent violated Section 8(a)(5)(1) of the Act.

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The IATSE Complaint alleges that since about August 31 the Respondent has failed and refused to continue in effect all the terms and conditions of employment of its agreement by:

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- (a) Failing and refusing to make authorized deduction of union dues from vacation pay paid to unit employees and refusing to remit these dues to the union as required by the contract;
- (b) Failing and refusing to pay unit employees for their accrued vacation time, as provided in the contract; and

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(c) Failing and refusing to pay unit employees severance pay as provided in the contract.

It is further alleged that on about September 14, the Respondent bypassed IATSE and dealt directly with the unit employees by requiring them to sign the following waiver in order to receive vacation pay:

By signing this check, employee agrees that it has been paid all it is owed for accrued pay and waives any and all claims for that purpose.

It is alleged that by the acts specified above in (a) through (c) and by asking the employees to sign this waiver and thereby bypass the Union, it violated Section 8(a)(5)(1) of the Act.

The Consolidated Complaint and Compliance Specification issued on February 7, 2014. It alleges that the Respondent ceased its operations at the locations involved on August 31 and although it has paid certain vacation pay amounts to the TWU unit employees on about September 14 and April 5, 2013, it has:

(a) Failed and refused to pay the TWU unit employees for the remaining accrued vacation hours as of August 31:

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- (b) has failed and refused to pay the lead employees in the TWU unit the lead employee wage differential for their accrued vacation hours: and
- (c) has failed and refused to pay the TWU unit employees any severance pay.

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The Consolidated Complaint and Compliance Specification<sup>2</sup> further alleges that although the Respondent paid vacation pay amounts to its IATSE unit employees on September 14 and the

Counsel for the General Counsel's Motion to Further Amend the Compliance Specification, dated April 7, 2014, which makes minor changes in the backpay allegedly owed to the TWU unit and would substitute for General Counsel's Exhibit 3, is hereby granted.

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vacation pay balance on April 5, 2013, it has failed and refused to pay the lead employees the lead employee wage differential for their accrued vacation hours and has not paid severance pay to any of the IATSE unit employees. The amounts due are, allegedly, as follows:

5	TWU Unit Vacation Pay Due	\$3,010		
	TWU Unit Severance Pay Due	\$108,000		
10	IATSE Unit Vacation Pay Due	\$1,348		
	IATSE Unit Severance Pay Due	\$260,066		

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Respondents' Answer states that it ceased being the prime service contractor for the Air Force on August 31 when the Air Force decided to in source the work involved herein, and that due to the loss of the work, the unit employees were all terminated on September 1. Respondent defends that as the employees were terminated, without any possibility of being recalled when they lost the contract, it has no obligation to pay the unit employees severance pay. In the alternative, Respondent defends that even if severance pay is due to the unit employees, it should be the Air Force, rather than the Respondent, that is obligated to pay the severance pay to the employees. Respondent further argues that it "pursued a challenge to the in-sourcing at great expense to itself" and that both unions refused to join it in this pursuit: "...HP3 went to great time and expense to file and receive payment on this certified claim, an effort done completely on its own without any assistance from either the Unions or the NLRB..." Respondent further denies that it owes any additional vacation pay to TWU unit employees because Article 27.7 of the TWU contract states that the maximum carry-over for vacation pay is 180 hours, and also denies that it owes a lead wage differential to the TWU unit as Article 31.3 of the contract states that employees will receive lead pay for all holidays and vacations while on leave; the employees herein were not on leave, they were terminated. Respondent admits that it has not paid severance pay to the TWU unit due to: "the loss of the VOMS contract due to in-sourcing and the great expense incurred by the Respondent both in working to stop the insourcing and to file the certified claim with the USAF."

As regards the IATSE unit, Respondent denies that any additional vacation pay is owed as Article 19.2.4 of the IATSE contract states that the maximum carryover for vacation pay is one time the annual award, any unused credits in excess were to be paid in January of each calendar year: "Respondent did not pay the excess in January 2012 and IATSE did not grieve the action, thereby waiving its right to claim the excess credit now." Further, Respondent denies that lead wage differential is owed to the IATSE unit. The IATSE contract states that employees will receive lead pay for all hours worked: "Employees do not get lead pay while not working or terminated." Respondent admits that it didn't pay severance pay to either the TWU or the IATSE employees:

The combination of the loss of the VOMS contract due to in sourcing and the great expense incurred by Respondent both in working to stop the in-sourcing and to file the certified claim with the USAF to obtain the severance payments...has resulted in putting Respondent in a difficult financial situation and unable to pay all severance at one time.

#### I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of the Act and that TWU and IATSE have each been labor organizations within the meaning of the Act.

#### II. The Facts

#### **Waiver Language on Employee Checks**

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IATSE represented approximately twenty of the Respondent's unit employees. The paychecks that the IATSE employees received dated September 14, which included the initial payment for vacation pay, contained the following language: "By signing this check employee agrees that it has been paid all that it is owed for accrued pay and waives any and all claims for that purpose." Jaroslaw Lipski, the IATSE Business Manager, testified that prior to the distribution of these paychecks, the Respondent never notified the Union that they were going to insert this waiver language on the checks. On September 28, Lipski wrote to Jason Freeman, Respondent's President, stating that not only were the amounts on some of these checks incorrect, but that he was surprised "...with the attempt to bamboozle the employees by adding the 'waiver' language on the back of the checks." On November 28, counsel for IATSE wrote to counsel for Respondent asking that Respondent send him something stating that the waiver language on the checks can be disregarded and that the Respondent will not attempt to enforce it. By email dated December 13 to Lipski and counsel for IATSE, counsel for the Respondent stated that the Respondent would not enforce the waiver language for any IATSE member with a claim for additional vacation pay.

#### Failure to Remit Due to IATSE

The contract between the Respondent and IATSE contains a checkoff provision
authorizing the Respondent to deduct Union dues from employees who have executed the
proper authorizations, and to transmit these amounts to the Union. On September 14, when the
Respondent sent vacation pay checks to IATSE unit employees, it did not deduct any Union
dues from these checks, nor did it transmit any dues to the Union. In Lipski's September 28
email to Freeman, he stated that the Respondent did not check off and forward the dues to the
Union. On April 23, 2013, the Respondent sent a check in the amount of \$1882 to IATSE, as full
payment for the checked off dues owed to IATSE from the vacation pay paid to its unit
members.

#### **Background**

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The Respondent obtained the Vehicle Operations and Maintenance Services (VOMS) contract at these two locations in about 2008. Freeman testified that in 2011 the Air Force advised the Respondent that it was going to in-source the work which, at the time, was performed by the Respondent's employees at the two locations. After hearing this, Kevin Smith, the TWU President, emailed Freeman, with a copy to IATSE saying that his members were concerned, and asked: "Just to be clear and to put some of my members' fear to rest. The company will be paying out severance pay upon layoffs at the end of the contract...correct?" Freeman responded later that day (also with IATSE copied): "Our intention is to attempt to comply with the CBA." On July 21 John Rogers, Respondent's Vice President of Operations, sent an email to both unions saying that the Air Force was still intending to insource the work and that Freeman would like to meet with the unions "...to see if we can help to throw a wrench in their plan and make it more difficult to insource." At about this time, Smith had a telephone conversation with Rogers who asked him if the Union would agree to lower the employees' wages by about \$5 an hour in order to assist in maintaining the contract and Smith replied that, unfortunately, he could not agree to that. In about September 2011, Rogers told him that the Air Force had agreed to postpone the in sourcing for about a year.

The Respondent's VOMS contract was terminated effective September 1 and the employees' last day of employment with the Respondent was August 31. The employees were sent the following letter from the Respondent dated August 17:

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Due to the government's decision to in-source your positions and terminate the existing Vehicle Operation and Maintenance contract, this letter will serve as formal notification that as a result of the termination of our contract, your employment with Hallmark Phoenix 3, LLC has been terminated. The termination becomes effective 1September 2012.

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You will be compensated for all hours worked and remaining vacation through the end of your normal workday...

On July 7, Smith wrote to Rogers, inter alia:

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I wanted to point out one condition of the Contract that will continue to be your obligation if you must layoff the current workforce covered by our Collective Bargaining Agreement.

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Article 30.1 states the following: Any employee with one (1) year or more of service under this agreement **who is laid off for any reason** other than those set forth in paragraph 30.2 and 30.5 shall receive severance pay as set forth in paragraph 30.4. I'm bringing this to your attention just to make sure that you understand your obligation to the article and the severity of the issue...

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By letter to Freeman dated July 3, counsel for IATSE wrote that while they were also disappointed at the loss of the VOMS contract, IATSE intends to strictly enforce the severance pay provision contained in Section 20.6 of their contract. Counsel for the Respondent answered six days later that the government told them that they do not believe that severance is warranted because they view their action as a termination pursuant to 23.3 of the contract rather than the layoff provision of 20.6.1. By email dated August 3, IATSE wrote to Rogers stating that employees were asking about severance pay and when they can expect to receive it, and Rogers responded later that day that, "If they are paid it will be a lump sum payment," but the government claims that they are not liable for it and, "It will be a fight..."

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After losing the VOMS contract, Respondent began negotiating with the Air Force in order to recoup costs that it anticipated might be associated with the loss of the contract and possible severance pay for the unit employees. When the negotiations proved unsuccessful, Respondent filed a claim with the Air Force and, in about August 2013, Respondent was paid \$400,382 by the Air Force as a severance pay settlement. None of this money has yet been paid to either IATSE or TWU employees.

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It is alleged that the Respondent violated Section 8(a)(5)(1) of the Act by refusing to continue in effect all the terms and conditions of its collective bargaining agreements with IATSE and TWU, by failing and refusing to pay severance pay to its IATSE employees pursuant to Article 20.6 of the IATSE Agreement, and to the TWU employees pursuant to Article 30 of the TWU Agreement. It is further alleged that the Respondent has failed to pay all of the accrued vacation pay due to the TWU employees pursuant to their contract, as well as the \$1.50 differential to be paid to the TWU lead employees, and that while all accrued vacation pay was paid to the IATSE employees, although delayed, the Respondent has failed to pay the \$1.50 lead differential for all hours of accrued vacation pay to the IATSE lead employees. By these refusals, Respondent is alleged to have violated Section 8(a)(5)(1) of the Act.

#### **Vacation Pay**

The relevant portions of the collective bargaining agreements are, for the TWU unit:

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An employee who has completed his probationary period shall be paid for his accrued vacation upon termination of employment with the Company, except that he shall not be paid for such vacation if he has been discharged for a cause involving monetary or material loss to the Company.

27.7

Vacation carryover will be permitted, per the following schedule. Any excess hours not used will be forfeited. Days over and above this requirement are in a use or lose situation, maximum carry over allowed as of 9/30 is 180 hours.

Carry over does not apply if HP3 is not the successful contractor for the rebid of VOM.

<u>31</u>.3

Any employee selected by Management to perform a lead function shall receive \$1.50 per hour in addition to his regular straight- time base rate of pay for all hours worked as lead. If an employee performs as a lead for 30 days or more and is off on holiday, vacation or sick leave, he shall continue to receive sick pay.

The TWU contract provides for annual vacations ranging from ten days to twenty two days for employment periods of one to twenty years. As the Respondent paid the IATSE vacation pay, albeit delaying the payment by about seven months, it is not necessary to cite or discuss the Vacation provision in its contract. However, as the Respondent has not paid the lead pay premium for these vacation hours, paragraph 6 of Schedule B states:

30 <u>Lead Pay</u>

Any employee that performs a lead function shall receive \$1.50 per hour in addition to his/her straight-line base rate of pay for all hours worked as a lead.

By email dated September 24, Smith wrote to counsel for the Respondent denigrating his argument that 27.7 limits their vacation pay obligation, stating that neither Respondent nor any other employer bid on the post-September 1 work: "How can you win or lose a contract you aren't bidding on?" Counsel for the Respondent replied that pursuant to 27.7 of the TWU contract, as the Respondent "was not awarded the follow-on VOM contract, so the carryover provisions do not apply. Given this, the maximum vacation paid is any earned and not used since October 1, 2011 to the date of termination."

By email to Rogers dated September 24, Smith wrote that the vacation checks paid to the TWU employees were "far short of what they should have been." The balance of the vacation pay has never been paid and Smith testified that the amount set forth on Appendix A of Counsel for the General Counsel's Motion to Amend the Compliance Specification accurately represents the balance owed to the TWU employees. On November 15, TWU filed a grievance alleging that the Respondent did not pay its members their accrued vacation balance effective August 31.

Lipski and Smith testified that, in the past, the Respondent has paid its lead employees the lead premium rate for their vacation hours and Counsel for the General Counsel introduced into evidence some of Respondent's payroll records which establish that prior to September 1

Respondent paid its lead employees the \$1.50 lead premium rate for vacation hours. Smith testified: "It's part of the contract, it's been enforced for years and we never had a dispute prior to that from anybody." However, after September 1, the Respondent did not pay this lead pay differential with the lead employees' vacation pay. Rogers testified that lead pay is paid for lead work, and since employees don't work during vacations, they are not entitled to lead pay for this period. He also testified that prior premium payments to lead employees during vacation periods were paid by mistake, and that vacation pay was not due to the TWU employees under 27.7 of their contract as the Respondent was not the successful contractor for the rebid of the VOMS contract.

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#### **Severance Pay**

It is undisputed that Respondent has failed to pay severance pay to either its TWU employees or its IATSE employees. Article 30 of the TWU contract provides that severance pay is to be determined by the length of employment of each employee, ranging from three weeks for one year of service to thirteen weeks for twelve years of service. In addition:

#### <u>30.1</u>

An employee with one year or more of service under this Agreement who is laid off for any reason other than those set forth in paragraph 30.2 and 30.5 shall receive severance pay as set forth in paragraph 30.4.

#### 30.2

Severance allowance will not be paid if the layoff is the result of an Act of God, a national war emergency, dismissal for cause, resignation, retirement, or a strike or picketing causing a temporary cessation of work.

#### 30.8

Such severance pay shall be paid at the end of a waiting period of 30 days from the date of such layoff.

The IATSE contract provides for one week of severance pay for one year of service up to eighteen weeks of severance pay for seventeen years of service, as well as:

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Any employee with more than 6 months of continuous service credit, who has established seniority, shall be entitled to severance pay when involuntarily laid off because of lack of work for a period in excess of 30 days; however, no employee shall be entitled to severance pay in cases where such layoff is due to fire, flood, explosion, bombing, earthquake or Act of God, causing damage at locations where work is performed under this agreement, or from strikes or work stoppages resulting in the inability to maintain normal operations.

#### 20.6.3

Such severance pay shall be paid at the end of a waiting period of 30 days from the day of such layoff.

Rogers testified that the Respondents' position was that neither the TWU employees or the IATSE employees were entitled to severance pay; the IATSE employees because Article 20.6.1 ends by saying "resulting in the inability to maintain normal operations," and the loss of the VOMS contract resulted in their inability to maintain normal operations. As for the TWU employees, he testified: "...as for TWU, there's a clause in there that says it becomes null and

void, so I wasn't really sure about that." As stated *supra*, both Smith and counsel for IATSE wrote to the Respondent in July setting forth their views that if the Respondent terminated the employees because the Air Force insourced the work that they had been performing, then they would be entitled to severance pay under their contracts. Rogers responded to Smith by email dated August 28 that the government disputes that severance paid is owed, but that "we will be pursuing a claim." Smith responded that whether the government disputes that it is owed is irrelevant as "the contract is clear." Also as stated, *supra*, counsel for IATSE wrote to Freeman on July 3 to "remind" him of the contract's requirement for severance pay, and counsel for the Respondent responded six days later saying that the request was premature and that the government believes that the employees are not entitled to severance and have refused to pay any portion of it. By letter dated September 28 to Freeman, the "bamboozle letter," Lipski stated that the amount in a few of the employees' checks were incorrect and on October 9, IATSE filed a grievance, and an amended grievance on October 15, alleging a violation of Articles 19, 20 and 23 in that the checks were incorrect. On October 18, the Responded denied the grievance:

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As Company mentioned before, this grievance is untimely with respect to severance pay. On July 9, 2012, the Company sent a letter explaining our interpretation and the Union did not respond in a timely manner. Any claim for additional vacation pay is untimely as well because under the terms of the CBA, those payments were to be paid in January 2012 they were not and the Union did not challenge it. The sums paid reflect all vacations owed under the CBA. Based on sums paid, no additional union dues are owed.

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Lipski responded five days later that the grievance was timely and that they should proceed to arbitration. The Respondent maintained its position that the grievance was untimely, and it never went to arbitration.<sup>3</sup> The TWU and IATSE contracts contain identical provisions regarding timeliness of grievances:

#### 8.2 (TWU), 6.2 (IATSE):

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All grievances shall be presented as soon as practicable after the occurrence of the event on which it is based, but in no event later than 10 working days if it is a dismissal grievance, or if the grievance arises from any other cause, no later than 20 working days from the date the union knew or reasonably should have known of the events giving rise to the grievance. The Arbitrator may consider the timeliness of the non-termination grievances filed after the 20<sup>th</sup> day and before the 45<sup>th</sup> day and may continue the matter where there is a justifiable excuse for the untimeliness. The failure to submit a grievance within a period of 45 days shall constitute an absolute bar to further action.

#### 8.3 (TWU), 6.3 (IATSE)

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Time limits for grievances at any step, or for any response, may be extended by mutual agreement between the union and HP3...

Respondent defends that arbitration is the proper forum for this matter, not the Board, although it has denied the Union's grievances as untimely and has refused to waive the time limits contained in the contracts.

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<sup>&</sup>lt;sup>3</sup> Counsel for the Respondent, by email to Smith dated November 27, 2012, stated: "I have discussed this matter with Ms. Pabon [of the Board] and her letter does not recite our entire written agreement on timeliness issues. We did not agree to waive all timeliness issues. We agreed to allow the grievance and arbitration to proceed for filing purposes, but whether other aspects of timeliness affect entitlement was not waived.

By email dated April 18, 2013, the Respondent notified Smith that the Air Force had just "agreed to pay the severance to HP3, so it can pass it along to the former employees...it will probably take about 3-4 months to get the payments." On July 26, 2013, counsel for the Respondent notified Counsel for the General Counsel that the Air Force agreed to pay the Respondent \$400,382 for severance and that it should be sent out soon.

#### **Kevin Ratliff**

Article 20.6.3 of the IATSE contract, concludes by stating: "Severance pay will not be granted when the employee accepts employment of the same, similar or greater responsibility or skill by a Successor Contractor to the PAFB & CCAF VOM." Ratliff<sup>4</sup>, who had been employed by the Respondent's predecessors at the facility, began working for the Respondent when they obtained the VOMS contract in about 2008. He was employed primarily as a heavy driver, and spent about sixty to eighty percent of his time driving a tractor-trailer; about twenty to forty percent was spent driving a bus and the remaining five percent was as a forklift operator. He was unemployed from September 1 through November 4, and was offered a job by the Air Force in late October and began working for the Air Force as a vehicle operator dispatcher on November 5 at the prior facility. His job with the Air Force involves, primarily, scheduling. He deals directly with customers setting up bus support, and occasionally operates a forklift. Scheduling and data entry requires about fifty to seventy percent of his time, bus support work consumes about twenty to thirty percent, leaving about five percent for forklift work. The bus support duties (and, apparently, the forklift work) are similar to the work that he performed for the Respondent, Ratliff identified a document that lists the training that he has received from the Air Force. It includes training in thirty seven areas of Operational Security; he received training from Respondent in about ten of these areas. While employed by the Respondent he wore a uniform of polo shirt, pullover and gray slacks; at the Air Force he does not wear a uniform. In his current position he uses a computer about sixty percent of the time; while employed by the Respondent he only used a computer for training purposes. His employment with the Respondent required him to have Class A CDL license with HAZMAT, which permitted him to drive vehicles in excess of 32,000 pounds with HAZMAT materials. His present license is Class B, for driving a bus with fifteen to fifty passengers. He testified that while employed by the Respondent he was responsible for the truck that he was operating; now he spends most of his time on data entry on the computer, which he hadn't done previously, coordinating the locations of several vehicles at a time. He testified that the work presently is more difficult for him than his work for the Respondent because it's a new job, although, "...I don't see it as being a greater responsibility what I do now. It's different, but not necessarily greater. "

Rogers, who was involved in transportation and vehicle maintenance for the Air Force from 1984 to 2005, testified that a dispatcher is much more responsible than a driver because he is, basically the supervisor of the drivers, and he "absolutely" believes that Ratliff's present position as a dispatcher involves greater responsibility than he had while employed by the Respondent, although he has not personally witnessed Ratliff's work for the Air Force.

45 III. Analysis

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Two weeks after they were terminated by the Respondent due to the in sourcing by the Air Force, the IATSE employees were asked to sign a waiver that the check that they received

<sup>&</sup>lt;sup>4</sup> In the Respondent's claim for reimbursement from the Air Force dated December 11, it included Ratliff's severance pay in the amount of \$20,800.

for accrued vacation pay was all that they were owed by the Respondent. Prior to issuing these checks with the waiver on the back, the Respondent had not notified the union that it was going to do so, nor did it offer to bargain with the Union about this language. As this was clearly a mandatory subject of bargaining, the Respondent was obligated to bargain with the Union prior to presenting the employees with this "Hobson's Choice" of endorsing the checks and possibly waiving their rights. By the failure to do so, the Respondent violated Section 8(a)(5)(1) of the Act. *Kaiser Permanente*, 248 NLRB 147 (1980). Respondent defends that it notified the Union that it would not enforce this waiver, but this notification came two months later and was not adequate to relieve itself of liability for this activity. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

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Although its contract with IATSE contained a dues checkoff provision, when the Respondent sent these checks to the IATSE employees on September 14 for their accrued vacation pay, it failed to deduct union dues from this pay or to transmit these amounts to IATSE. Lipski notified the Respondent of this error and the Respondent did not transmit these dues to IATSE until April 23. By failing to deduct dues from these checks and failing to transmit this amount to the Union until April 23, the Respondent violated Section 8(a)(5)(1) of the Act. As these dues have since been deducted and transmitted to the Union, no remedy is required.

It is undisputed that the Respondent failed to pay the \$1.50 lead pay differential to the TWU and IATSE lead employees for their vacation pay. The evidence establishes that in the past (while it operated under the VOMS contract) the Respondent paid this \$1.50 differential to the lead employees for their vacation pay. The Respondent defends that these payments were a mistake and that the IATSE contract states that the differential shall be paid "...for all hours worked as a lead" and Side Letter #2 of the IATSE contract states that they will receive lead pay "for all payroll hours." [Emphasis added]. However, vacation hours are earned from hours worked and are therefore payroll hours. The TWU contract contains similar language as well, but adds: "If an employee performs as a lead for 30 days or more and is off on holiday, vacation or sick leave, he shall continue to receive sick pay." As vacation pay is a term and condition of employment and a mandatory subject of bargaining, an employer cannot unilaterally make changes in the unit's terms of employment during the term of the agreement. NLRB v. Katz. 369U.S. 736 (1962). The evidence is clear that the Respondent previously paid the lead differential to its lead employees for vacation pay prior to September 1. By refusing to pay this differential for vacation pay after September 1, and by failing to pay all of the accrued vacation hours to the TWU unit employees, the Respondent unlawfully modified a mandatory subject of bargaining in violation of Section 8(a)(5)(1) of the Act. Daycon Products Company, Inc., 357 NLRB No. 52 (2011). Respondent defends that the TWU contract provides that maximum carryover is 180 hours, but the contract states that this restriction is not effective until September 30, thirty days after the termination. It also defends that carryover does not apply if the Respondent is not "the successful contractor for the rebid of VOM." However, neither the Respondent nor anyone else bid on the contract as the Air Force began performing the work with its own employees. As there was no bidding for the contract there could be no successful bidder. Therefore this sentence does not relieve the Respondent of its obligation to pay the balance of the vacation pay due to the TWU employees. I therefore find that the Respondent has failed to pay all of the accrued vacation hours to the TWU unit members, as well as the lead differential to lead persons Schevella Davis and Craig Peterson, in the amounts set forth in Appendix A. I further find that the Respondent has failed to pay the lead differential to IATSE lead persons James Harris, Jerry James, Wilson Scott and Thomas Veltri in the amounts as set forth in Appendix B.

It is also undisputed that the Respondent refused to pay severance pay to its employees in both units. Both contracts specifically provide for severance pay. The TWU contract provides

that it need not be paid where the layoff results from "an Act of God, a national war emergency, dismissal for cause, resignation, retirement, or a strike or picketing causing a temporary cessation of work" (none of which is true herein), and under Duration of Agreement it states: "This Agreement shall be null and void for any period(s) for which the Company is not the prime service contractor for the above mentioned scope of work." This provision obviously refers to any future obligations of the Respondent, rather than past obligations, such as vacation pay and severance pay. The IATSE contract refers to similar situations, as well as "...strikes or work stoppages resulting in the inability to maintain normal operations." Respondent defends that this last part of this sentence warrants it to refuse to pay severance to the IATSE unit. However, this must be read in its entirety, and clearly refers to strikes or work stoppages by the unit employees that result in an inability to maintain normal operations, rather than the loss of a contract to perform the work, as is true in this situation. As it was the loss of the VOMS contract, rather than a strike or work stoppage, that resulted in the loss of work, severance pay is due to the IATSE employees as well. By refusing to pay severance pay to the TWU and IATSE employees, Respondent violated Section 8(a)(5)(1) of the Act.

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The Respondent defends, generally, that as this matter involves contract interpretation, it is improperly before the Board and that its proper forum is arbitration. I would agree with counsel's argument, except that, at least, one aspect of deferral is missing: the Respondent's agreement to waive the timeliness issue. In *Hallmor, Inc.*, 327 NLRB 270 (1998), the Board, in denying referral to arbitration, referred to *Collyer Insulated Wire*, 192 NLRB 837 (1971) and stated:

A key element of the deferral policy is the parties' expressed willingness to waive contractual time limitations in order to ensure that the arbitrator addresses the merits of the dispute...One critical element is that the party seeking deferral agrees to waive any contractual time limitations...Here, the Respondent plainly breached its agreement not to raise a timeliness defense.

On the other hand, in *Caritas Good Samaritan Medical Center*, 340 NLRB 61 (2003), the Board deferred to the parties grievance arbitration procedure where the employer offered to waive any timeliness issue. As the Respondent has not unconditionally offered to waive timeliness issues herein, this matter is not appropriate for deferral to the parties' grievance arbitration process.

The final issue relates to Ratliff, who was terminated by the Respondent along with the other employees on September 1, and who began working for the Air Force on November 5. The IATSE contract states that employees who accept employment of the same, similar or greater responsibility with the Successor Contractor for the VOM contract are not entitled to severance pay, and Respondent argues that since Ratliff's job with the Air Force involves greater responsibility, he is not entitled to full severance pay. Ratliff's employment with the Respondent primarily involved driving a tractor-trailer carrying HAZMAT material, while his job for the Air Force primarily involves using a computer on data entry doing scheduling. Clearly, his work for the Respondent was more difficult, physically, than operating a computer, while his present job requires more "skill" than his job with the Respondent as shown by the extensive computer training for his position with the Air Force. I find that his present job has "greater responsibility and skill" than his prior position and that he would be excluded from the provisions of 20.6.3, except that this provision also provides that the new employer be the "Successor Contractor" to the VOM that the Respondent operated under. As previously stated, as the Air Force in-sourced the work, there was no "Successor Contractor." Therefore Ratliff is entitled to his full severance pay.

#### **Conclusions of Law**

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. TWU and IATSE are each labor organizations within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(5)(1) of the Act by adding the waiver language on the back of the employees' vacation pay checks without prior discussion with IATSE, the collective bargaining representative of these employees.
- 4. Respondent violated Section 8(a)(5)(1) of the Act by failing to deduct the Union dues from the September 14 vacation pay checks to these employees and failed to transmit these dues to the Union, in violation of the contract, and without prior notification to, or negotiations with, IATSE.
- 5. Respondent violated Section 8(a)(5)(1) of the Act by failing to pay all of the vacation pay that it was obligated to pay to the TWU employees under its contract, and by failing to pay all of the vacation pay that was due to its IATSE employees, under that contract, in a timely manner.
  - 6. Respondent violated Section 8(a)(5)(1) of the Act by failing to pay severance pay to its TWU and IATSE employees.
  - 7. Respondent violated Section 8(a)(5)(1) of the Act by failing to pay to its lead employees the \$1.50 wage differential along with their vacation pay, as required under its contracts with the Unions.

30 The Remedy

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Having found that the Respondent has violated the Act, I recommend that it be ordered to cease and desist from engaging in this activity and to take certain action designed to effectuate the policies of the Act. As the Respondent, in April, transmitted the dues to IATSE that were not deducted in September, no affirmative remedy is required for that violation and as the Respondent paid the IATSE employees the balance of their vacation pay on about April 5, no affirmative remedy is necessary for that violation. As this case is a combined unfair labor practice Complaint together with a Compliance case, and as I have found merit to the allegations herein, I recommend that the Respondent be ordered to pay the amounts set forth below in Appendix A and Appendix B, attached hereto, to the employees listed thereon who had been represented by TWU and IATSE. Also, as the employees are no longer employed by the Respondent, I shall recommend that the Respondent be bordered to mail a copy of the Notice herein, together with Appendix A and B, to each of the employees at their last known address, at the Respondents expense, as well as posting this Notice at each of its locations within the State of Florida.

Upon the foregoing findings of fact, conclusions of law and on the entire record, I hereby issue the following recommended<sup>5</sup>

<sup>&</sup>lt;sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. Continued

#### **ORDER**

The Respondent, Hallmark-Phoenix 3, LLC, its officers, agents, successors and assigns, shall

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- 1. Cease and desist from
- (a) Adding waiver language on the back of the employees' vacation pay checks stating that the check represents the full amount that the employees are owed, without prior discussion with the collective bargaining representative of these employees.
- (b) Failing to deduct the IATSE Union dues from the September 14 vacation pay checks to these employees and failing to transmit these dues to the Union, in violation of the contract, and without prior notification to, or negotiations with, IATSE.

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(c) Failing or refusing to pay all of the severance pay and failing to pay the vacation pay in a timely manner to its IATSE employees, and failing to pay severance pay and vacation pay to its TWU employees.

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- (d) Failing to pay to its lead employees the \$1.50 wage differential along with their vacation pay, as required under its contracts with TWU and IATSE.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act:

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- (a) Pay to its TWU represented employees the vacation pay, severance pay and lead employee differential pay due them pursuant to their contract, as set forth herein in Appendix A.
- (b) Pay to its IATSE represented the severance pay and lead pay differential due them pursuant to their contract, as set forth herein in Appendix B.

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(c) Within 14 days after service by the Region, post at each of its facilities in the State of Florida, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. As the Respondent no longer employs these employees due to the loss of the VOM contract, it shall mail a copy of this Notice, together with Appendix A and B, at its own expense, to each of its employees as of August 31, 2012, at their last known address.

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<sup>102.48</sup> of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

	certification of a responsible official on a the Respondent has taken to comply.	form provided by the Region attesting to the steps that
5	Dated, Washington, D.C. May 19, 2014	Į.
10		Joel P. Biblowitz Administrative Law Judge
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(d) Within 21 days after service by the Region, file with the Regional Director a sworn

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#### APPENDIX A

Hallmark-Phoenix 3, LLC Cases 12-CA-090718 12-CA-094037

## APPENDIX A (As Amended April 7, 2014) TWU LOCAL 525 UNIT VACATION PAY AND SEVERANCE PAY

	Hourly wage	Unpaid accrued vacation	Vacation pay owed based on unpaid accrued vacation hours (includes lead		Vacation pay owed based on unpaid lead differential for hours already	Total vacation	Weeks of severance	Hours of severance	Severance
Employee name	rate	hours	differential)	owed	paid	pay owed	pay owed	pay owed	pay owed
Brown, Walter	\$29.60	13.43	\$397.53			\$397.53	13	520	\$15,392.00
Castro, Joseph	\$29.60	0	\$0.00			\$0.00	5	200	\$5,920.00
Crowley, Joe	\$29.60	7.93	\$234.73	·		\$234.73	13	520	\$15,392.00
Davis, Schevella	31.10 (Lead)	7.93	\$246.62	104.37	\$156.56	\$403.18	13	520	\$16,172.00
Harper, Tim	\$29.60	7.53	\$222.89			\$222.89	0	0	\$0.00
Hubbard, Brian	\$29.60	30.84	\$912.86			\$912.86	13	520	\$15,392.00
Lockhart, Leon	\$29.60	7.77	\$229.99			\$229.99	13	520	\$15,392.00
Peterson, Craig	31.10 (Lead)	4.9	\$152.39	182.6	\$273.90	\$426.29	11	440	\$13,684.00
Weidner, Mark	\$29.60	6.78	\$200.69			\$200.69	9	360	\$10,656.00
Totals			\$2,597.70		\$430.46	\$3,028.16			\$108,000.00

#### Notes:

 $\label{thm:employees} \mbox{Employees whose names are in bold (Schevella Davis and Craig Peterson) were lead employees.}$ 

Unpaid accrued vacation hours = (Hours accrued as of pay period ending 8/15/12 + hours earned in pay period ending 8/31/12) minus

(accrued vacation hours paid on September 14, 2012 + accrued vacation hours paid in April 2013), as follows:

Brown: (259.46 + 7.34) - (176 + 77.37) = 266.8 - 253.37 = 13.43 Crowley: (213.96 + 7.34) - (92 + 121.37) = 221.3 - 213.37 = 7.93 Davis: (104.96 + 7.34) - (97.5 + 6.87) = 112.3 - 104.37 = 7.93 Harper: (57.57 + 7.34) - (57.38) = 64.91 - 57.38 = 7.53

Hubbard: (289.98 + 7.67) - (136 + 90.81 + 40) = (297.65 - 266.81) = 30.84 (Hubbard took 40 hours of vacation during the pay period ending 8/31/12.)

Lockhart: (253.8+7.34) - (176+77.37) = 261.14 - 253.37 = 7.77 Peterson: (182.5+5.0) - (64+118.60) = 187.5 - 182.6 = 4.9 Weidner: (211.82+5.0) - (120+90.04) = 216.82 - 210.04 = 6.78

#### APPENDIX B

Hallmark-Phoenix 3, LLC Cases 12-CA-090718 12-CA-094037

### APPENDIX B (AS FURTHER AMENDED APRIL 7, 2014) IATSE LOCAL 780 UNIT VACATION PAY AND SEVERANCE PAY OWED

		Hourly	Vacation hours paid on 9/14/12 and 4/2013 for which lead pay of \$1.50 per hour is	hours paid on 9/14/12	Weeks of severance	Hours of severance	Severance
Employee Name	Original hire date	wage rate	owed	and 4/2013	pay owed	pay owed	pay owed
Anderson, Donald L.	8/2/2002	\$32.51			11	440	\$14,304.40
Carpenter, Reid M.	7/24/1987	\$32.51			18	720	\$23,407.20
Chick, Daniel J.	4/23/2009	\$32.51			4	160	\$5,201.60
Garrett, Mary L.	5/14/1996	\$27.31			17	680	\$18,570.80
Gorr, Thomas P.	4/1/1994	\$32.51			18	720	\$23,407.20
Grove, John C.	9/20/2011	\$30.04			1	40	\$1,201.60
Harmon, Richard E.	5/21/2002	\$28.89			11	440	\$12,711.60
Harris, James Y.	4/1/1994	\$30.39	154.5	\$231.75	18	720	\$21,880.80
Hudec, Ralph	1/26/2011	\$28.91			2	80	\$2,312.80
James, Jerry J.	4/1/1994	\$34.01	348	\$522.00	18	720	\$24,487.20
Kelley, Nathan C.	2/23/2003	\$32.51			10	400	\$13,004.00
Lemieux, Timothy A.	10/1/2008	\$25.53			4	160	\$4,084.80
McDougall, Josephine M.	8/29/2005	\$28.89			8	320	\$9,244.80
Phillips, Kevin	4/27/2009	\$32.51			4	160	\$5,201.60
Ratliff, Kevin W.	4/1/1994	\$28.89			18	720	\$20,800.80
Rice, Kristine M.	9/20/2011	\$21.69			1	40	\$867.60
Scott III, Wilson	10/1/1994	\$34.01	100	\$150.00	18	720	\$24,487.20
Sewell, Kenneth R.	10/4/2004	\$32.51			8	320	\$10,403.20
Veltri, Thomas J.	10/1/1985	\$34.01	296.64	\$444.96	18	720	\$24,487.20
Totals				\$1,348.71			\$260,066.40

Note: Employees whose names are in bold were lead employees.

#### **APPENDIX C**

#### **NOTICE TO EMPLOYEES**

#### Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

**WE WILL NOT** ask you to agree that the amount on your vacation pay check was the full amount owed to you without previously discussing it with International Alliance of Theatrical Stage Employees and Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 780, AFL-CIO ("IATSE") and if you signed such a waiver, **WE WILL NOT** enforce it.

**WE WILL NOT** fail to deduct your IATSE dues from your paychecks, pursuant to a valid checkoff authorization, and **WE WILL NOT** fail to transmit these dues to IATSE.

**WE WILL NOT** fail to pay you your vacation pay, and we will do so in a timely manner, and **WE WILL NOT** fail to pay to our lead person employees the \$1.50 an hour lead pay differential for their vacation hours, both of which provisions are provided in our contracts with IATSE and Transport Workers Union of America, Local 525, AFL-CIO ("TWU").

**WE WILL NOT** fail to pay you severance pay as also required by our contracts with IATSE and TWU.

**WE WILL NOT** in any like or related manner interfere with, restrain or coerce you in the exercise of your rights under Section 7 of the Act.

**WE WILL** reimburse you for the amount that you lost, if any, due to our failure to pay you severance pay, vacation pay and the lead pay differential for vacation pay, and **WE WILL** compensate you for any tax consequences of receiving a lump sum payment, and **WE WILL** file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

### HALLMARK-PHOENIX 3, LLC (Employer)

Dated	Ву	
	(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530

Tampa, Florida 33602-5824 Hours: 8 a.m. to 4:30 p.m. 813-228-2641.

The Administrative Law Judge's decision can be found at <a href="www.nlrb.gov/case/12-CA-090718">www.nlrb.gov/case/12-CA-090718</a> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 813-228-2662.